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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

United States of America,)	CR 10-3738-TUC-RCC(HCE)
Plaintiff,)	REPORT AND RECOMMENDATION
vs.)	
Pedro Antonio Figueroa-Burrue,)	
Defendant.)	
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Presently pending before the Court is Defendant’s Motion To Dismiss Indictment (Doc. 15). The Government Filed a Response To Defendant’s Motion To Dismiss Indictment (Doc. 25). Defendant’s Motion came on for hearing on August 16 and 31, 2011. Ms. Alicia Perez (hereinafter “Ms. Perez”), Defendant’s mother, and Defendant testified on August 16, 2011. ICE Officer Joseph Harvey testified for the Government on August 31, 2011. Transcript of the August 16, 2011 evidentiary hearing was filed on August 25, 2011 (Doc. 31); transcript of the August 31, 2011 evidentiary hearing was filed on September 16, 2011 (Doc. 44). Both are forwarded to the District Court for review.

Admitted into evidence are: (1) Defendant’s Exhibit 1: Notice of Approval of Relative Immigrant Visa Petition; (2) Government Exhibit 21(hereinafter “Gov. Exh.__”): Form I-867-A Record of Sworn Statement In Proceedings under Section 235(b)(1) of the Act (hereinafter “Form I-867A”), dated November 8, 2005; (3) Gov. Exh. 22: Form I-867A, dated September 27, 2005; (4) Gov. Exh. 23: Form I-867A, dated August 1, 2005; (5) Gov.

1 Exh. 24: Form I-867A, dated July 6, 2005; (6) Gov. Exh. 25: Form I-867A, dated May 17,
2 2005; (7) Gov. Exh. 26: Form I-867A, dated March 9, 2003; (8) Gov. Exh. 27: In Removal
3 Proceedings-Order of the Immigration Judge (hereinafter "Order") in A95 118 394, dated
4 June 22, 2005; (9) Gov. Exh. 30: Order in A95 118 394, dated January 18, 2005; (10) Gov.
5 Exh. 31: Notice to Appear/Notice to Respondent (hereinafter "Notice to Appear") in A95 118
6 394, dated January 6, 2005; (11) Gov. Exh. 32: Order in A95 118 394, dated May 2, 2002;
7 (12) Gov. Exh. 35: Form I-215B Record of Sworn Statement In Affidavit Form (hereinafter
8 "Affidavit") in A95 118 394, dated September 27, 2005; (13) Gov. Exh. 36: Affidavit in A95
9 118 394, dated June 6, 2005; (14) Gov. Exh. 37: Affidavit in A95 118 394, dated May 17,
10 2005; (15) Gov. Exh. 38: Notice to Appear in A78 046 804, dated September 9, 2000; (16)
11 Gov. Exh. 40: Order in A78 046 804, dated September 14, 2000; and (17) Gov. Exh. 41:
12 Form I-205 Warrant of Removal/Deportation in A78 046 804, dated September 14, 2000.
13 The following recordings are also admitted into evidence: Gov. Exh. 29: June 22, 2005
14 Removal Hearing; Gov. Exh. 34: May 2, 2002 Removal Hearing; Gov. Exh. 39: September
15 14, 2000 Removal Hearing.

16 After consideration of testimony presented, exhibits admitted into evidence, and
17 argument of respective counsel, the Magistrate Judge recommends that the District Court
18 grant Defendant's Motion To Dismiss Indictment (Doc. 15).

19 **I. PROCEDURAL AND FACTUAL BACKGROUND**

20 **A. Charge**

21 Defendant is charged with: on or about November 23, 2010, at or near Douglas, in the
22 District of Arizona, entering or being found in the United States of America after having
23 been denied admission, excluded, deported, and removed therefrom at or near Nogales,
24 Arizona on or about October 14, 2009, and not having obtained the express consent of the
25 Attorney General or the Secretary of the Department of Homeland Security to re-apply for
26 admission thereto, in violation of 8 U.S.C. §1326, enhanced by 8 U.S.C. §1326(b)(1). (Doc.
27 5).

1 **B. Factual Background**

2 Defendant was born on August 20, 1980 in Agua Prieta, Sonora, Mexico. Defendant's
3 mother, Ms. Perez, was born in Mexico but is a United States citizen derivatively by virtue
4 of her father, who was born in the United States. Ms. Perez had previously filed an
5 Application for Certificate of Citizenship on May 12, 1980, and was issued a certificate of
6 citizenship on December 14, 1981.

7 In 1983, when Defendant was three years old, Ms. Perez petitioned the United States
8 government to have Defendant admitted as a lawful permanent resident, (Ms. Alicia Perez
9 August 16, 2011 Testimony (Doc. 31) at p. 10 (hereinafter "Ms. Perez at p. _"); Defendant's
10 Exhibit 1). Ms. Perez was issued a card by the Immigration and Naturalization Service
11 (hereinafter "INS")¹ for Defendant, but it was physically lost 15 years ago. (*Id.* at p.11). Ms.
12 Perez also applied for and received a social security number for Defendant and later on,
13 helped Defendant obtain a driver's license. (*Id.* at pp. 11-12). While living with Ms. Perez,
14 Defendant attended public schools into high school. (*Id.* at p. 12). Ms. Perez never gave
15 Defendant his lawful permanent resident card for fear of his losing it. (*Id.*). Ms. Perez did not
16 feel it was necessary to tell Defendant of his permanent resident status. (*Id.* at p.13).

17 Defendant was arrested and detained September 9, 2000² by an immigration officer.
18 (Gov. Exhs. 38, 39, 40, 41).³ He was brought before an immigration judge on September 14,
19 2000. (Gov. Exh.39). At that hearing, Defendant along with other immigration detainees
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21 ¹The INS is now called the Bureau of Citizenship and Immigration Services, but will
22 be referred to as "INS" in the Report and Recommendation.

23 ²Defendant was first fingerprinted by INS in April of 1999. (ICE Officer Joseph
24 Harvey August 31, 2011 Testimony (Doc. 44) at pp. 39-40 (hereinafter "Officer Harvey at
25 p. _")).

26 ³Defendant's "A" number on file with INS is: A78 046 804. Defendant also maintains
27 that his original "A" number when first given legal permanent residency on August 21, 1983
28 is A388 290 12. (Defendant's Motion To Dismiss Indictment (Doc. 15) at p. 2 (*citing* Exh.
A)). Review of Defendant's Motion and Exhibit A attached thereto, and Defendant's Exh.
1, which is a copy of Exh. A, reveals no "A" number whatsoever.

1 were advised generally by the immigration judge through a Spanish interpreter that the
2 government maintains: (1) they are not citizens of the United States; (2) they are citizens of
3 another country; (3) they entered at a time and place not authorized; and (4) they were not
4 authorized to be in the United States and were here illegally. (*Id.*).

5 Defendant and the other immigration detainees were also advised generally by the
6 immigration judge through a Spanish interpreter that there are ways to avoid deportation to
7 legalize one's status in the United States. (*Id.*). One such way is if one: (1) has resided in the
8 United States for 10 continuous years; (2) has a parent who is a United States citizen; and (3)
9 has not had grave problems with the police. (*Id.*). The immigration judge asked anyone who
10 felt they fit this description to raise a hand. (*Id.*). No one raised his or her hand. (*Id.*).

11 Later on in the immigration proceedings, with use of a Spanish interpreter, Defendant
12 was specifically asked if Jose Rodriguez-Burrue1 was his true and correct name, to which he
13 responded "yes"; what country he was born in, to which he responded "Mexico"; whether
14 he entered the United States near Douglas on September 9, 2000, to which he responded
15 "yes"; whether he had permission from an immigration officer to be in the United States, to
16 which he responded "no". (*Id.*). The immigration judge concluded that the government's
17 charge was true and ordered Defendant's removal from the United States to Mexico. *Id.* The
18 immigration judge asked Defendant if he wanted to reserve his right to appeal, to which
19 Defendant responded "no". (*Id.*).

20 Defendant states that he first learned he was not a United States citizen in 2002 when
21 he was arrested⁴ and questioned regarding where he and his mother were born. (Pedro
22 Antonio Figueroa-Burrue1 August 16, 2011 Testimony (Doc. 31) at p. 21 (hereinafter
23 "Figueroa-Burrue1 at p._")). The arresting agent informed him that because both Defendant
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27 ⁴Neither the Government nor Defendant proffers sufficient information regarding the
28 context of Defendant's arrest and detention in 2002. Defendant states it was "a random stop."
(Figueroa-Burrue1 at p. 21).

1 and his mother had been born in Mexico, Defendant was not a U.S. citizen (*Id.*).⁵ Defendant
2 was fingerprinted by the arresting agent but “nothing showed up. So he send [sic] me to a - -
3 he send [sic] me to a judge in Tucson.” (*Id.* at p. 22). Defendant was arrested on April 24,
4 2002, and charged on April 26 of 2002, with a petty offense of illegal entry in Case No. 02-
5 po-06471-CRP-1, for which he was convicted and sentenced on April 30, 2002 to time-
6 served. Prior to 2006, Defendant always thought he was a United States citizen. (*Id.* at p.21).

7 Defendant soon thereafter appeared before an immigration judge. (Figueroa-Burrueal
8 at p. 23).⁶ Defendant did not advise the immigration judge that he had permission to be in the
9 United States, or that he had a permanent resident alien card. (*Id.*). Defendant did not call his
10 mother to say that he was in custody or that he was to appear before an immigration judge.
11 (*Id.*). Defendant recalls being advised that he had a right to appeal the immigration judge’s
12 decision. (*Id.* at p. 24). Defendant waived his right to appeal believing that he had no status
13 to be in the United States as the detaining agent had so informed him. (*Id.* at pp. 21, 25).
14 Defendant states that had he known at that time that he had legal status to be in the United
15 States, he would have appealed the immigration judge’s decision to deport him. (*Id.*).

16 Defendant was ordered removed from the United States to Mexico on May 2, 2002
17 under “A” number A95 118 394. (Gov. Exh. 32). Defendant was deported through Nogales,
18 Arizona. (Figueroa-Burrueal at p. 26). People with whom he was deported provided him with
19 a bus ticket to Agua Prieta, Sonora, Mexico, where he again entered illegally and returned
20 to his mother’s home. (*Id.*). He explained to his mother that he had been deported. (*Id.* at p.
21 27). Defendant’s mother explained to Defendant that he was not a citizen and that she had
22 lost the card which authorized Defendant to be in the United States. (*Id.*). After talking to his

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24 ⁵The Government did not provide a Record of Sworn Statement In Affidavit Form
25 (Form I-215B) nor a Record of Sworn Statement In Proceedings Under Section 235(1) of the
Act (Form (I-867A) to corroborate this interview with Defendant.

26 ⁶Defendant appeared before an immigration judge on May 2, 2002, wherein he: (1)
27 admitted being born in Mexico; (2) admitted entering illegally into the United States on April
28 24, 2002 at or near Douglas, Arizona; and (3) did not want to appeal the immigration judge’s
order of removal. (Gov. Exhibit 34).

1 mother, Defendant believed he did not have permission to be in the United States. (*Id.*).

2 Defendant was detained on March 9, 2003, when he presented himself at the Douglas,
3 Arizona Port of Entry claiming to be a United States citizen. (Gov. Exh. 26). When
4 interviewed by an immigration officer, he stated: (1) Agua Prieta, Sonora, Mexico as his
5 correct place of birth; (2) August 20, 1980 as his correct date of birth; (3) he had resided in
6 the United States for twenty years; (4) his mother was born in Mexico; and (5) his mother
7 was a United States citizen. (*Id.*).⁷

8 Defendant was arrested on or about September 4, 2004. (Figueroa- Burruel at p. 28).
9 Defendant was charged and, on September 4, 2004, was convicted of illegal entry and
10 sentenced to serve 4 months of incarceration in 04-po-03590-GEE-1. Defendant was served
11 with a Notice to Appear on January 6, 2005, wherein the INS alleged that he was found in
12 the United States at or near Douglas, Arizona, on August 20, 2004, and had not been
13 admitted or paroled after inspection by an immigration officer. (Gov. Exh. 31).
14 Consequently, Defendant was ordered removed from the United States to Mexico on January
15 18, 2005. (Gov. Exh. 30; Figueroa-Burruel at p. 28).⁸

16 On May 17, 2005, Defendant was detained and interviewed by an immigration officer.
17 (Gov. Exh. 25). Defendant stated: (1) Agua Prieta, Sonora, Mexico as his correct place of
18 birth; (2) August 20, 1980 as his correct date of birth; (3) he has resided in the United States
19 “[from] time to time”; and (4) his mother is a United States citizen. (*Id.*). Defendant also
20 informed the same immigration officer in another interview that he previously had a resident
21 alien card that was taken away. (Gov. Exh. 37). Defendant thereafter was charged and, on
22 May 19, 2005, was convicted of illegal entry and sentenced to a time-served sentence in 05-
23 po-06588-CRP-1. Defendant later appeared before an immigration judge and believing that
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25 ⁷The Government has provided no information regarding the resolution of this contact
26 with INS.

27 ⁸The Government did not provide a Record of Sworn Statement In Affidavit Form
28 (Form I-215B) nor a Record of Sworn Statement In Proceedings Under Section 235(1) of the
Act (Form I-867A) to corroborate, if any, interview of Defendant by an immigration officer.

1 he did not have legal status to be in the United States, gave the same answers to the same
2 questions previously asked by an immigration judge, and was ordered deported. (Figueroa-
3 Burruel at pp. 28-29). Defendant opines that had he known that he had been granted
4 permanent residency as a result of his mother having applied for such, he would not have
5 waived his right to appeal. (*Id.* at p. 29).

6 On June 6, 2005, Defendant was detained and interviewed by an immigration officer.
7 (Gov. Exh. 36). Defendant stated: (1) Agua Prieta, Sonora, Mexico as his correct place of
8 birth; (2) August 20, 1980 as his correct date of birth; and (3) that he had a resident alien card
9 when he “was a kid.” (*Id.*). Defendant was ordered deported from the United States to
10 Mexico on June 22, 2005. (Gov. Exh. 27).

11 On July 6, 2005, Defendant was detained and interviewed by an immigration officer.
12 (Gov. Exh. 24). Defendant stated: (1) Agua Prieta, Sonora, Mexico as his correct place of
13 birth; (2) August 20, 1980 as his correct date of birth; and (3) his mother is a United States
14 citizen. (*Id.*).

15 On August 1, 2005, defendant was detained and interviewed by an immigration
16 officer. (Gov. Exh. 23). Defendant stated: (1) Agua Prieta, Sonora, Mexico as his correct
17 place of birth; (2) August 20, 1980 as his correct date of birth; and (3) his mother is a United
18 States citizen. (*Id.*).

19 On September 27, 2005, Defendant was detained and interviewed by an immigration
20 officer. (Gov. Exh. 35). Defendant stated: (1) Agua Prieta, Sonora, Mexico as his correct
21 place of birth; (2) August 20, 1980 as his correct date of birth; (3) he previously had a
22 resident alien card; and (4) “Just that the only reason that I keep coming back is that I do not
23 have anyone or anything in Mexico. I have nothing in Mexico. All my family is here in the
24 United States.” (*Id.*). To the same immigration officer in another interview, Defendant
25 stated: (1) Agua Prieta, Sonora, Mexico as his correct place of birth; (2) August 20, 1980 as
26 his correct date of birth; (3) his mother is a United States citizen; (4) he has lived in the
27 United States since he was a year old; and (5) his mother had applied for documents allowing
28 him to enter, remain or pass through the United States when he was a minor. (Gov. Exh.22).

1 On November 8, 2005, Defendant was detained and interviewed by an immigration
2 officer. (Gov. 21). Defendant stated: (1) Agua Prieta, Sonora, Mexico as his correct place of
3 birth; (2) August 20, 1980 as his correct date of birth; (3) his mother is a United States
4 citizen; (4) he has lived in the United States since he was a year old; (5) his mother applied
5 for documents allowing him to enter, remain or pass through the United States when he was
6 a minor; and (6) his mother brought him through the port of entry when he was a year old.
7 (*Id.*).

8 Defendant was subsequently charged with illegal entry in 05-po-08294-JJM-1. On
9 November 23, 2005, by order of the Court, the complaint was dismissed.

10 Defendant was arrested on November 8, 2005 and charged with illegal re-entry after
11 deportation. (CR 05-02244-TUC-DCB(JCG) (Doc. 1)). Defendant was represented by Mr.
12 George Soltero of the Federal Public Defenders Office. On December 29, 2005, the
13 Government, without stating a reason, moved to dismiss the indictment. (*Id.* at Doc. 8). The
14 District Court granted the Government's motion and dismissed the indictment without
15 prejudice. (*Id.* at Doc. 9).

16 Each time that Defendant entered, he was taken to an immigration judge and the order
17 of deportation was reinstated resulting in Defendant's deportation. (Figueroa-Burrueal at p.
18 30).

19 Defendant was arrested on May 15, 2006 and charged with illegal re-entry after
20 deportation. (CR 06-01084-TUC-DCB(CRP) Doc. 1). Defendant was represented by his
21 present counsel. Defendant's counsel filed a motion to dismiss stating that dismissal of the
22 indictment was warranted because, *inter alia*, the order of deportation was fundamentally
23 unfair, citing 8 U.S.C. §1326(d). (*Id.* at Doc. 12). On January 5, 2007, the Government,
24 without stating a reason, moved to dismiss the indictment. (*Id.* at Doc. 21). The District Court
25 granted the Government's motion and dismissed the indictment without prejudice. (*Id.* at
26 Doc. 22). Thereafter, Defendant appeared before an immigration judge and informed the
27 immigration judge of his legal status in the United States and did not agree to his deportation.
28 (Figueroa-Burrueal at pp. 30-31). Defendant was deported nonetheless. (*Id.* at p. 31).

1 **II. ANALYSIS**

2 Defendant is presently charged with Illegal Re-entry After Deportation, in violation
3 of 8 U.S.C. §1326. A defendant may challenge the legality of the underlying administrative
4 removal order. *See United States v. Mendoza-Lopez*, 481 U.S. 828, 837-38 (1987). In such
5 a criminal proceeding, to collaterally attack the validity of his removal on October 14, 2009,
6 Defendant herein must demonstrate in the conjunctive⁹, that:

- 7 (1) [he] exhausted any administrative remedies that may have
8 been available to seek relief against the order;
9 (2) the deportation proceedings at which the order was issued
10 improperly deprived the alien of the opportunity for judicial
11 review; and
12 (3) the entry of the order was fundamentally unfair.

13 8 U.S.C. §1326(d).

14 **A. Exhaustion of Administrative Remedy**

15 An alien is barred from collaterally attacking an underlying order of deportation “if
16 he validly waived the right to appeal that order” during the deportation proceedings. *United*
17 *States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000). The Ninth Circuit is also clear that the
18 “exhaustion requirement of 8 U.S.C. §1326(d) ... ‘cannot bar collateral review of a
19 deportation proceeding when the waiver of right to an administrative appeal did not comport
20 with due process.’” *United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1048 (9th Cir.
21 2004)(quoting *United States v. Muro-Inclan*, 249 F.3d 1180, 1182 (9th Cir. 2001)). Where a
22 defendant’s waiver of the right to appeal a removal order does not comport with due process,
23 the defendant is exempted from the exhaustion requirement of section 1326(d)(1). *Id.* at
24 1050. Indeed, “[a] waiver of the right to appeal a removal order does not comport with due
25 process when it is not ‘considered and intelligent.’” *Id.*

26 Such a waiver is not “considered and intelligent” when the
27 “record contains an inference that the petitioner is eligible for
28 relief from deportation, but the Immigration Judge fails to
“advise the alien of this possibility and give him the opportunity
to develop the issue.”

⁹A defendant must satisfy all three requirements in order to prevail. *See United States v. Fernandez-Antonia*, 278 F.3d 150, 157 (2nd Cir. 2002).

1 *Muro-Inclan*, 249 F.3d at 1182 (*citing* Arrieta, 224 F.3d at 1079 (*quoting* *Moran-Enriquez*
2 *v. INS* 884 F.2d 420, 422023 (9th Cir. 1989))).

3 A combination of factors led to depriving Defendant the process he was due. Since
4 the onset of Defendant's first contact with the immigration court in 2000, the record is replete
5 with the consistent failure of INS to properly discern Defendant's eligibility for relief from
6 deportation and to inform him of such.

7 First, when Defendant was accorded legal residency at the age of three in 1983, he
8 was assigned an "A" number by INS. Defendant provided INS immigration officers with
9 personal data that would place INS on notice of Defendant's previous lawful presence in the
10 United States. Defendant was eventually assigned a second "A" number which was not
11 consolidated with Defendant's earlier assigned "A" number until some later time. (Officer
12 Harvey at pp. 67-68). Second, this Court can reasonably assume that INS, like any federal
13 law enforcement agency, properly obtained Defendant's fingerprints in their encounters with
14 Defendant. (*See* Officer Harvey at pp. 37-40). Yet, at no time with this information did INS
15 cobble together Defendant's "A" numbers on file or prior contacts with INS and information
16 provided to and obtained by INS. Third, information provided to and obtained by INS
17 indicates an array of facts that would apprise an immigration officer as well as an
18 immigration judge that Defendant may have a plausible claim to relief from deportation: his
19 place of birth, his date of birth, he had resided in the United States, his mother is a United
20 States Citizen, and he previously had a resident alien card.

21 Despite this information, both the interviewing immigration officer and the
22 immigration judge focused on the narrow basis for Defendant's deportation: he was born in
23 Mexico and he did not have authorization to be in the United States at the time he was
24 detained.

25 Aliens, even aliens whose presence in this country is unlawful,
26 have long been recognized as "persons" guaranteed due process
of law by the Fifth and Fourteenth Amendments.

27 *Phyller v. Doe*, 457 U.S. 202, 210 (1982). Affidavits and/or Form I-867A's, completed by an
28 immigration officer in his or her contact with Defendant, containing the above-enumerated

1 information, were undoubtedly forwarded or made available as part of the record to the
2 immigration judges presiding at Defendant's hearings. It would not have been burdensome
3 for INS to marshal and marry this information to determine Defendant's status in the United
4 States.

5 Because aliens appearing pro se often lack the legal knowledge
6 to navigate their way successfully through the morass of
7 immigration law, and because their failure to do so successfully
8 might result in their expulsion from this country, it is critical
that the I[mmigration] J[udge] "scrupulously and
conscientiously probe into, inquire of, and explore for all the
relevant facts."

9 *Agyeman v. INS*, 296 F.3d 871, 877 (9th Cir. 2002)(citing *Jacinto v. INS*, 208 F.3d 725, 733
10 (9th Cir. 2000) (quoting *Key v. Heckler*, 754 F.2d 1545, 1551 (9th Cir. 1985))).

11 The immigration judge is authorized to administer oaths, receive evidence, and to
12 interrogate, examine, and cross-examine the alien and any witnesses under 8 U.S.C.
13 §1229a(b)(1). However, as an administrative law judge, the immigration judge "acts as an
14 examiner charged with developing the facts." *Richardson v. Perales*, 402 U.S. 389, 410
15 (1971). The immigration judge's failure to develop the record compounded Defendant's
16 inability to make a "considered and intelligent" decision to waive his right to appeal his
17 deportation.

18 **B. Denial of Judicial Review**

19 A non-United States citizen may petition the Ninth Circuit Court of Appeals for
20 judicial review within 30 calendar days from the date of the Final Administrative Removal
21 Order. 8 U.S.C. §1252(b)(1); see *Flores-Ledezma v. Gonzales*, 415 F.3d 375 (5th Cir.2005).

22 Title 8 U.S.C. §1252 provides, in pertinent part, for the exclusive means of review:

23 Notwithstanding any other provision of law (statutory or non-
24 statutory), ... , *a petition for review filed with an appropriate*
25 *court of appeals in accordance with this section shall be the sole*
and exclusive means for judicial review of an order of removal
entered or issued under any provision of this chapter,

26 8 U.S.C. §1252(a)(5)(emphasis added). Title 8 U.S.C. §1252 further provides that:

27 Nothing in [the provisions that limit or eliminate judicial
28 review] ... shall be construed as precluding review of
constitutional claims or questions of law raised upon a petition

1 for review filed with an appropriate court of appeals in
2 accordance with this section.

3 8 U.S.C. §1252(a)(2)(D).

4 The Government maintains that Defendant is:

5 *In general.* An alien present in the United States without being
6 admitted or paroled, or who arrive[d] in the United States at any
time or place other than as designated by the Attorney General,
[and] is inadmissible.

7 8 U.S.C. §1182(a)(6)(A)(i)(emphasis added). Furthermore:

8 In general. Any alien who falsely represents, or has falsely
9 represented, himself ... to be a citizen of the United States for
any purpose or benefit under this chapter ... is inadmissible.

10 8 U.S.C. §1182(a)(6)(C)(ii)(I). However:

11 *Exception.* In the case of an alien making a representation
12 described in subclause (I), if each natural parent of the alien ...
13 is or was a citizen (whether by birth or naturalization), the alien
14 permanently resided in the United States prior to attaining the
age of 16, and the alien reasonably believed at the time of
making such representation that he or she was a citizen, the alien
shall not be considered to be inadmissible under any provision
of this subsection based on such representation.

15 8 U.S.C. §1182(a)(6)(C)(ii)(II)(emphasis added). Defendant's personal life circumstances
16 reasonably appear to track the requirements of the above-described exception. Defendant
17 testified that he has always thought he was a citizen of the United States, and in fact asserted
18 as much on March 9, 2003 when he presented himself at the Douglas Port of Entry.

19 As set forth *supra*, at I.A., where the record contains an inference that the defendant
20 is eligible for relief from deportation, the immigration judge must advise him of this
21 possibility and give him an opportunity to develop the record. In such a case, the failure to
22 advise the defendant of his right to apply for relief from deportation constitutes a due process
23 violation that deprives the defendant of judicial review because "an alien who is not made
24 aware that he has a right to seek relief necessarily has no meaningful opportunity to appeal
25 the fact that he was not advised of that right." *Arrieta*, 224 F.3d at 1079; *see also United*
26 *States v. Ortiz-Lopez*, 385 F.3d 1202, 1204 n.2 (9th Cir. 2004).

27 Despite ample information regarding Defendant's status in the United States provided
28

1 or made available to the immigration judge, which gave notice that Defendant may arguably
2 have relief from deportation, the immigration judge in each instance was affixed to only
3 those allegations which supported Defendant's deportation. Although Defendant was advised
4 of his right to seek judicial review, which he invariably waived, the failure to inform him of
5 his eligibility for relief from deportation rendered such waiver invalid.

6 **C. Fundamental Unfairness**

7 Defendant must demonstrate conjunctively that: (1) his due process rights were
8 violated by defects in his underlying deportation proceeding, and (2) he suffered prejudice
9 as a result of the defects. *United States v. Zarate-Martinez*, 133 F.3d 1194, 1197 (9th Cir.
10 1998), *overruled on other grounds as discussed in United States v. Ballesteros-Ruiz*, 319
11 F.3d 1101, 1105 (9th Cir. 2003). As set forth *supra*, at II.A. and II.B. Defendant has
12 demonstrated a due process violation in the underlying removal proceeding.

13 To establish prejudice, Defendant need not show that he actually would have been
14 granted relief. *Ubaldo-Figueroa*, 364 F.3d at 1050. Instead, he must only show that he has
15 a "plausible" ground for relief from deportation. *Id.*

16 Defendant was a legal permanent resident. In order to rescind such status, INS must
17 comply with mandatory procedures. The regulations state that INS must commence
18 rescission proceedings by serving notice of intention to rescind containing specific
19 allegations against a resident alien. 8 C.F.R. §246.1. This notice must also inform the resident
20 alien of the right to submit within thirty days from the date of service of the notice, an answer
21 in writing under oath setting forth reasons why such rescission shall not be made and to
22 request a hearing before an immigration judge wherein evidence may be presented relevant
23 to why the rescission should not be ordered. *Id.*

24 INS may parole an alien pending inspection "for urgent humanitarian reasons" or
25 "significant public benefit," provided the alien presents neither a security risk nor a risk of
26 absconding. 8 C.F.R. §212.5(b). In making this determination, INS can look to community
27 ties, such as close relatives with known addresses. 8 C.F.R. §212.5(d)(2). Defendant had and
28 continues to have substantial ties to the community: his U.S. citizen mother with whom he

1 has resided since the age of three.

2 It is well established that if an alien is a lawful permanent
3 resident of the United States and remains physically present
4 there, ... [h]e may not be deprived of his life, liberty or property
5 without due process of law.

6 *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953).

7 The Government maintains that Defendant is inadmissible because he was neither
8 admitted nor paroled into the United States, having arrived at a time or place other than as
9 designated by the Attorney General. *See* 8 U.S.C. §1182(a)(6)(A)(i). However, Defendant

10 was entitled to U.S. citizenship, along with its rights and
11 privileges from the moment of birth, not upon the issuance of a
12 certificate of citizenship or any other formal determination by
13 the INS or any government official.

14 *United States v. Smith-Baltiher*, 424 F.3d 913, 920-21 (9th Cir. 2005); *Solis-Espinoza v.*
15 *Gonzales*, 401 F.3d 1090, 1092-94 (9th Cir. 2005)(8 U.S.C. §1401(g) provides for citizenship
16 at birth).

17 On the instant record, the immigration judge did not properly develop the record,
18 resulting in rescission of Defendant's legal immigration status by an improper procedure.
19 Had the record been properly established¹⁰ by the immigration judge, it is reasonably likely
20 that Defendant would have requested a hearing to contest his removal and deportation. Had
21 such hearing resulted in an order of removal and deportation, it is reasonably likely that
22 Defendant would have appealed and established a plausible ground for relief from
23 deportation: he was either a legal permanent resident having resided in the United States for
24 over 20 years with his U.S. citizen mother or a derivative U.S. citizen. The prejudice suffered
25 by Defendant is self-evident: the defective *a priori* September 14, 2000 order of deportation
26 resulting in serial orders of deportation, including the October 14, 2009 order of deportation

27 ¹⁰INS maintains systems that can be tracked by fingerprints, or event numbers based
28 on contacts with INS. (Officer Harvey at pp. 37-38). Defendant has been fingerprinted
approximately 46 times since 1999. (*Id.* at pp. 39-40). INS linked Defendant's September
1995 A78 046 804 and April 29, 2002 A95 118 394 files by his fingerprints taken in those
respective files. (*Id.* at pp. 66-67).

1 relied on herein by the Government.

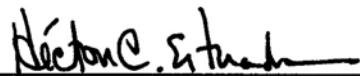
2 **III. CONCLUSION AND RECOMMENDATION**

3 For the foregoing reasons, the Magistrate Judge recommends that the District grant
4 Defendant's Motion to Dismiss Indictment (Doc. 15).

5 Pursuant to 28 U.S.C. §636(b), Rule 59 of the Federal Rules of Criminal Procedure,
6 LRCrim 12.1 and LRCiv 7.2(e), any party may serve and file written objections within
7 fourteen (14) days after being served with a copy of this Report and Recommendation. If
8 objections are filed, the parties should use the following case number: **CR 10-3738-TUC-**
9 **RCC.**

10 Failure to file objections in accordance with Fed.R.Crim.P. 59 will result in waiver
11 of the right to review.

12 DATED this 7th day of October, 2011.

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Héctor C. Estrada
16 United States Magistrate Judge
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